A

MBF FINANCE BHD

v.

WILA INDUSTRIAL CHEMICALS SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D8-22-510-2001]
23 APRIL 2009

C ***CONTRACT:*** *Loan - Loan facility - Default on repayments - Plaintiff's claim for outstanding balance - Whether transaction a sham, illegal and against public interest - Whether evidence showed genuineness of transaction - Whether plaintiff ought not to be deprived of right to remedy - Principle of ex turpi causa non oritur action - Whether* D *applicable - Evidence Act 1950, s. 92(a)*

The plaintiff granted the first defendant a mortgage loan facility to finance the purchase of Unit G.57, a shop lot located in a complex, UE3 Shopping Mall in Kuala Lumpur (Unit G.57) from the third parties. Along with the loan application form was E submitted the first defendant's Board of Directors' Resolution approving the purchase, and a copy of the sale and purchase agreement dated 5 August 1996. A loan facility agreement was then signed between the parties. The first defendant agreed to repay this loan by monthly installments of RM16,893.11. Amongst F the security provided was the assignment of Unit G.57 and the second, third and fourth defendants standing as guarantors. The loan was disbursed to the third parties but the first defendant defaulted on the repayments. The plaintiff's claim was for the outstanding balance together with interest. The defendants were G sued jointly and severally. The defendants filed a defence and counterclaim. In summary, the plea was that the whole transaction was a sham, illegal and against public interest. According to the defendants, the intention was to assist the third parties in giving the public an impression that the lots in UE3 Shopping Mall were H selling fast and that as soon as there were genuine buyers, the properties would be transferred to these buyers. According to the defence, the defendant was told to treat the debt as a paper debt. The principal issue here was whether the sale and purchase agreement and related thereto the loan facility and the guarantee I agreements were null and void.

Held (allowing plaintiff's claim; dismissing defendants' counterclaim):

(1) Before the court sets aside any contract, there must be evidence of the illegality, fraud or sham which is said to be contrary to public policy. Where the contract is not itself *ex facie* illegal, other documents or extrinsic evidence may be admitted to defeat the contract even if the effect is to vary or contradict the contract. This is allowed under s. 92(a) Evidence Act 1950. In this case, the extrinsic evidence offered were the oral evidence of DW1, DW2 and DW4, who gave evidence that they were approached by one Madam Thong Swee Mei (then Chief Executive and President of MBF Property Services Sdn Bhd (MPSSB)). According to the said witnesses, the said Madam Thong proposed that DW1, DW2 and DW4 pose as buyers of shoplots in UE3 Shopping Mall from the third parties so as to give the impression that the sale of properties was a success. All three witnesses testified that they had agreed because they were afraid that rejection of the said Madam Thong's requests 'might jeopardize our business relationship.' However, there was no evidence at all before the court to justify DW1's fear that non-cooperation might jeapordise the business relationship. (paras 6, 8, 9 & 12)

(2) The evidence before the court was that the first defendant had purchased Unit G.57, seeking and being offered a loan facility by the plaintiff and the other defendants stood as guarantors for the loan facility. It was immaterial that the purchase was temporary because in the event of a sale, Unit G.57 would be transferred in like manner as other transfers executed in sale and immovable properties since the first defendant's name appeared on the relevant documents. The sale and purchase of Unit G.57 was therefore a genuine transaction. Further, neither Madam Thong nor a representative from MPSSB was called to give evidence and no legal action was instituted against Madam Thong or MPSSB for this transaction. (para 12)

(3) From the evidence presented, third parties were not at all given a mere appearance of a sale of Unit G.57 but a representation of the real prevailing conditions. The purchasers of the relevant properties, DW1, DW2 and DW4 were actual

A and not fictitious purchasers. Actual sales were transacted and the necessary legal documentation completed. Clearly, there were no different rights and obligations created. Reselling the properties for a price lower than the purchase price was not evidence enough to suggest any irregularity or impropriety in
B the transaction. In any event, this was irrelevant as Unit G57 was never resold except through foreclosure proceedings. This foreclosure was further evidence of the genuineness of the transaction. (para 14)

C **(4)** There was no evidence of the plaintiff being involved or even being aware of the so-called arrangement. The records of meetings and the subsequent conduct of the plaintiff did not indicate any evidence necessary to impute knowledge. For the sake of completeness, even if there was a sham as suggested
D by the defendants, the plaintiff ought not to be deprived the right to remedy where the plaintiff had no knowledge of the sham, fraud or illegal or unlawful object. On the other hand, the defendants who were parties to the sham would be prohibited from claiming. The principle of *ex turpi causa non*
E *oritur* action applied. (para 15)

Case(s) referred to:
Bank fur Gemeinwirtschaft Aktiengesellschaft v. City of London Garages Ltd [1971] 1 WLR 149 ***(refd)***
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***
F *Mason v. Clarke [1955] AC 778* ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar [1962] AC 294 ***(refd)***
Snook v. London and West Riding Investments Ltd [1967] 2 QB 786 ***(refd)***

Legislation referred to:
G Contracts Act 1950, s. 24
Evidence Act 1950, s. 92(a)

For the plaintiff - Andrew Teh (MY Foong with him); M/s Wong Lu Peen & Tunku Alina
H *For the defendant - YL Tho (Rejinder Singh with him); M/s YL Tho, Ng & Partners*

Reported by Suhainah Wahiduddin

I

JUDGMENT

Mary Lim JC:

[1] Upon the 1st defendant's application the plaintiff granted the 1st defendant a mortgage loan facility to finance the purchase of Unit G.57, a shop-lot located in a complex called UE3 Shopping Mall in Kuala Lumpur (Unit G.57) from the third parties. Along with the loan application form was submitted the 1st defendant's Board of Directors' Resolution approving the purchase, and a copy of the sale and purchase agreement dated 5 August 1996. A loan facility agreement was then signed between the parties on 30 September 1996. The loan was for RM1,573,900 with interest that was subject to variation at the plaintiff's discretion. The 1st defendant agreed to repay this loan by monthly installments of RM16,893.11. Amongst the security provided was the assignment of Unit G.57 and the 2nd, 3rd and 4th defendants standing as guarantors.

[2] The loan was disbursed to the third parties but the 1st defendant defaulted on the repayments. The plaintiff's claim is for the outstanding balance together with interest. The defendants are sued jointly and severally.

[3] Apart from filing a defence and a counterclaim the defendants initiated third party proceedings against the developers and sellers of Unit G.57. On 27 March 2006 a judgment in default of appearance was entered against the third parties. The claims against the 1st and 3rd defendants were withdrawn on 12 May 2008 when these defendants were wound-up and adjudged bankrupt respectively.

[4] The defence and counterclaim are premised on the same facts and issues. In summary the plea is that the whole transaction was a sham, illegal and against public interest. Following from that, the loan, sale and purchase and the guarantee agreements are all null and void. Specifically, para 2(b)(i) defence states:

> (i) Perjanjian Jual/Beli bertarikh 5hb Ogos 1996 antara Defendan Pertama dan Pihak-Pihak Ketiga bagi hartanah tersebut adalah satu perjanjian yang "sham" dan/atau salah di sisi undang-undang (illegal) yang dibuat untuk menolong Pihak-Pihak Ketiga memberi gambaran kepada orang ramai bahawa lot-lot perniagaan hartanah tersebut sedang dijual dengan pesat dan orang awam akan mempercayai bahawa harga yang

A tercatit dalam Perjanjian Jual-Beli bertarikh 5hb Ogos 1996 antara Defendan Pertama dan Pihak-Pihak Ketiga adalah harga pasaran sebenar yang pada hakikatnya bukan harga pasaran akan tetapi adalah satu harga yang lebih tinggi daripada harga pasaran dan orang awam akan mempercayai bahawa unit-unit dalam hartanah tersebut sedang dijual dengan pesat yang mana merupakan satu tipu helah ke atas orang awam. Lebih-lebih lagi Defendan Pertama hanyalah "nominee" Syarikat-Syarikat Kumpulan MBF BHD/Pihak-Pihak Ketiga sahaja dalam urusan jual/beli hartanah tersebut.

[5] So, according to the defendants, the intention was to assist the third parties in giving the public an impression that the lots in UE3 Shopping Mall were selling fast. This arrangement was supposed to be temporary. As soon as there were genuine buyers the properties would be transferred to these buyers. Upon receiving the plaintiff's notice of demand the defendants had discussions with the third parties. According to paragraph 11.10 of the defence the defendant was told to treat the debt as a paper debt – "satu hutang di atas kertas sahaja".

[6] The defendants called three witnesses to testify on the existence of the sham or illegal transaction: Chin Ping Sang, the 1st defendant (DW1), Hee Chin Chai (DW2) and Pee Kee Chiaw (DW4). These witnesses gave evidence that they were approached by one Madam Thong Swee Mei (then chief executive and president of MBF Property Services Sdn Bhd (MPSSB)). Madam Thong proposed that DW1, DW2 and DW4 pose as buyers of shop-lots in UE3 Shopping Mall from the third parties so as to give the impression that the sale of properties in UE3 Shopping Mall was a success. These witnesses agreed and the related sale and financing documents were then executed. All three witnesses testified that they agreed to cooperate in the arrangement because they were afraid that rejection of Madam Thong's requests "might jeopardize our business relationship". MPSSB was claimed by these witnesses to be their main/major client. Not cooperating was submitted to mean non-payment by MPSSB. These same witnesses also gave evidence on their participation in other similar arrangements in respect of other projects where the properties had transferred ownership to other buyers without mishap. Such properties were resold at prices lower than the purchase prices. Learned counsel for the defendants submitted that the fact that these sales were at prices lower than their

purchase prices was indicative of the transactions as sham, illegal and against public policy. The defendants also called DW3, the chartered surveyor and registered valuer who prepared the valuation report for Unit G.57. His evidence supposedly confirmed that Unit G.57 was sold at a value higher than its true value. DW1 also testified that he never expended any money.

[7] The principal issue here is whether the sale and purchase agreement and related thereto the loan facility and the guarantee agreements are null and void for the reasons put forth by the defendants. If so, then the defendants' counterclaim ought to be allowed and the plaintiff's claim dismissed.

[8] In *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 the Supreme Court said: "Courts have always set their face against illegality in any contract." This principle today, endures. But before the court sets aside any contract, there must be evidence of the illegality, fraud or sham which is said to be contrary to public policy. Where the contract is not itself *ex facie* illegal, other documents or extrinsic evidence may be admitted to defeat the contract even if the effect is to vary or contradict the contract. This is allowed under s. 92(a) Evidence Act 1950. Once admitted and read together with s. 24 Contracts Act 1950 the contract will be rendered unlawful and unenforceable.

[9] In this case the extrinsic evidence offered are the oral evidence of DW1, DW2 and DW4; and the indirect evidence of DW3 regarding the valuation of Unit G.57. Learned counsel for the defendants suggested that the cumulative effect of their evidence proves that the sham was pre-arranged and existed from inception. It was not an afterthought defence for the purpose of defending this action.

[10] The plaintiff adduced evidence through its Manager in the Asset Financing & Small Business – Receivables Management Department, En Ferdaus Mohd Amin (PW1) to show that the loan and guarantee agreements were normal and routine transactions. The loan was shown to have been disbursed and some payments had been made before the default occurred. The defendants through DW1 actually do not dispute this. DW1 confirmed both the documents to be "normal transaction documents" and the disbursement of the loan.

[11] Hence, does the evidence offered prove the existence of a sham transaction put in place for the purpose as submitted by the defendants? Having heard the oral testimony and having considered the documentary evidence offered I am not convinced of such existence.

[12] Even if the court is to accept that there was this proposal from Madam Thong Swee Mei, there is nevertheless no evidence at all before the court to justify DW1's fear that non-cooperation "might jeopardize our business relationship". There is no evidence of any outstanding bills of Madam Thong or MPSSB. The evidence clearly before the court is the 1st defendant purchasing Unit G.57, seeking and being offered a loan facility by the plaintiff, and the other defendants standing as guarantors for the loan facility. It is immaterial that the purchase is temporary because in the event of a sale, Unit G.57 will be transferred in like manner as other transfers executed in sale of immovable properties since the 1st defendant's name appears on the relevant documents. The sale and purchase of Unit G.57 is therefore a genuine transaction. This is fortified by DW1's concerns about the tax implications arising from the sale.

[13] Further, neither Madam Thong nor a representative from MPSSB was called to give evidence unlike the facts in *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd,* and *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] AC 294 where direct evidence of the proponents of the illegality gave evidence. No legal action was also instituted against Madam Thong or MPSSB for this transaction. The evidence at p. 353 bundle D does not assist the defendants. The letter merely confirms deferments of loan payments, withholding of further legal proceedings, prioritizing Unit G.57 amongst other properties for sale at a forthcoming Property Fair, and that a restructuring scheme was underway "to yield positive ending to this issue". Obviously the restructuring scheme was unsuccessful as the present action ensued.

[14] Insofar as the arrangement being a sham is concerned it can only be a sham if the arrangement or "... the acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if

any) which the parties intend to create" as per Diplock LJ in *Snook v. London and West Riding Investments Ltd* [1967] 2 QB 786. From the evidence presented, third parties are not at all given a mere appearance of a sale of Unit G.57 but a representation of the real prevailing conditions. The purchasers of the relevant properties, DW1, DW2 and DW4 are actual and not fictitious purchasers. Actual sales were transacted and the necessary legal documentation completed. When these properties are resold the necessary legal documentation would also be completed. Clearly, there are no different rights and obligations created. Reselling the properties for a price lower than the purchase price is not evidence enough to suggest any irregularity or impropriety in the transaction. In any event this is irrelevant as Unit G.57 was never resold except through foreclosure proceedings. The foreclosure is further evidence of the genuineness of the transaction.

[15] I further find no evidence of the plaintiff being involved or even being aware of the so-called arrangement. The records of meetings and the subsequent conduct of the plaintiff do not indicate any evidence necessary to impute knowledge. For the sake of completeness, even if there was a sham as suggested by the defendants, this court finds that the plaintiff ought not to be deprived the right to remedy where the plaintiff has no knowledge of the sham, fraud or illegal or unlawful object. See *Mason v. Clarke* [1955] AC 778 and *Bank fur Gemeinwirtschaft Aktiengesellschaft v. City of London Garages Ltd* [1971] 1 WLR 149. On the other hand, the defendants who are parties to the sham will be prohibited from claiming. The principle of *ex turpi causa non oritur actio* applies. In *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] AC 294 the Privy Council precluded a respondent from the aid of the court where the respondent had arranged for a transfer of property for an illegal or fraudulent purpose and where the fraudulent purpose had in fact been carried out.

[16] In the circumstances the plaintiff's claim is allowed with costs and the defendants' counterclaim is dismissed with costs.